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Paper No. 15
Bottorff

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Concurrent Technologies Corporation

Serial No. 76/040,164

Janet M. Pernell of Buchanan Ingersoll, P.C. for Concurrent Technologies Corporation.

Jennifer D. Chicoski, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney)

Before Hanak, Quinn and Bottorff, Administrative Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark depicted below



for services recited in the application as "providing multiple user access to a global computer network;

providing network, frame relay and asynchronous transfer mode connections for data transfer."¹

The Trademark Examining Attorney has made and maintained her final refusal to register applicant's mark under Trademark Act Section 2(d), on the ground that applicant's mark is confusingly similar to the following mark,



previously registered for services recited in the registration as "telecommunications services, namely local and long distance telephone services for individual and businesses and voice messaging services."²

Applicant and the Trademark Examining Attorney have filed main appeal briefs. Applicant did not file a reply brief, nor did applicant request an oral hearing. After

¹ Serial No. 76/040,164, filed May 4, 2000 on the basis of use in commerce under Trademark Act Section 1(a). August 1995 is alleged in the application as the date of first use of the mark anywhere and first use of the mark in commerce.

² Registration No. 1,954,453, issued February 6, 1996. §§8 and 15 affidavits accepted and acknowledged. The registration includes a statement that "the lining shown in the drawing is a feature of the mark and does not indicate color."

careful consideration of the evidence in the record and the arguments of counsel, we affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to a determination, under the first factor, of whether applicant's mark and the cited registered mark, when compared in their entirety in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks

is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, the dominant feature in the commercial impression of each of the marks is the apparently arbitrary³ acronym "CTC." Although both marks depict these letters in stylized form, in neither mark is the stylization so significant or pronounced that it would be the dominant source-indicating feature in the mark's commercial impression. Thus, although we have not disregarded the marks' respective stylizations, we have accorded such stylizations relatively less weight in our comparison of

³ There is no evidence in the record showing that the letters "CTC" have any descriptive significance in the industry, and applicant does not contend otherwise. We discuss, *infra*, applicant's argument that the acronym "CTC" is widely used by others and therefore is a "weak" mark entitled to a narrow scope of protection.

the marks. See, e.g., *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

In terms of appearance, we find that the marks are dissimilar to the extent that they are displayed in different stylizations, but that they otherwise are identical due to the fact that they both depict the identical letters "CTC." We also find that the marks are identical in terms of sound and connotation. Comparing the marks in their entireties in terms of their overall commercial impressions, we find that they are more similar than dissimilar; indeed, but for the relatively inconsequential differences in visual stylization, the marks are identical. The first *du Pont* evidentiary factor accordingly weighs in favor of a finding of likelihood of confusion.

We turn next to a determination, under the second *du Pont* factor, of the relationship between the services recited in applicant's application, i.e., "providing multiple user access to a global computer network; providing network, frame relay and asynchronous transfer mode connections for data transfer," and the services recited in the cited registration, i.e., "telecommunications services, namely local and long distance telephone services for individual and businesses

and voice messaging services." It is not necessary that these respective services be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods or services. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

The Trademark Examining Attorney has made of record some thirty use-based third-party registrations, in each of which the recitation of services includes some or all of the services recited in applicant's application and some or all of the services recited in the cited registration. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are

probative evidence to the extent that they suggest that the services identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). We find that this evidence suffices to establish that the services recited in applicant's application are sufficiently closely related to the services recited in the cited registration that confusion is likely to result if the respective services are offered under the similar marks involved in this case.⁴

We also find, under the third *du Pont* evidentiary factor, that the services recited in applicant's application and the services recited in the cited registration are marketed in the same trade channels and to the same classes of purchasers. Applicant's recitation of

⁴ Applicant has submitted evidence of an existing third-party registration of a CTC mark for various items of telecommunications hardware and software, goods which, applicant contends, arguably are more closely related than applicant's services are to the services recited in the cited registration. Applicant argues that if those two registrations can coexist on the register, applicant's mark should be registered as well. We are not persuaded. Previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding upon the agency or the Board. *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984). Moreover, the records of the coexisting registrations are not before us, so we do not know if there are circumstances, which would explain the coexistence of these registrations on the Register, such as a consent agreement.

services includes no restrictions or limitations as to trade channels or classes of purchasers, and we therefore must presume that the services are marketed in all normal trade channels for such services and to all normal classes of purchasers for such services. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). These would include the individuals and businesses to whom registrant's related services are marketed. Applicant's arguments to the contrary, which are based on alleged differences in applicant's and registrant's actual trade channels and classes of purchasers, are unavailing. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Likewise with respect to the fourth *du Pont* factor, applicant contends that its clients are sophisticated government and corporate entities which take great care in making their purchasing decisions. However, applicant's recitation of services contains no such limitations or restrictions as to classes of purchasers, and we find no basis in the record for concluding that purchasers of the services recited in the application necessarily are so sophisticated and careful in making purchasing decisions that likelihood of confusion is eliminated. The fourth *du Pont* factor is neutral, at best.

Under the sixth *du Pont* factor, evidence of use of similar marks in connection with similar services is relevant to our likelihood of confusion analysis. Applicant argues that there numerous "CTC" marks in use, and that the cited registered mark therefore is weak and entitled to only a narrow scope of protection. However, applicant's argument is not supported by the record. Applicant's reliance on third-party registrations of "CTC" marks is misplaced, because such registrations are not evidence of third-party use, for purposes of the sixth *du Pont* factor. *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).⁵

Finally, applicant argues that there has been no actual confusion between applicant's and registrant's marks despite six years of contemporaneous use. The absence of actual confusion weighs in applicant's favor under the seventh *du Pont* factor, but it is neutralized by the absence of evidence, under the eighth *du Pont* factor, which would establish that the opportunity for actual confusion to have occurred has been so great that the absence of actual confusion is factually or legally significant.

⁵ Moreover, the vast majority of those registrations cover goods and services which are completely unrelated to the services at issue in this appeal.

We have carefully considered all of the evidence of record pertaining to the du Pont likelihood of confusion factors. For the reasons discussed above, we conclude that a likelihood of confusion exists. If we had any doubt as to this result (we do not), we would resolve that doubt against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.